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**TOWN OF ACTON
INTERDEPARTMENTAL COMMUNICATION
TOWN MANAGER'S OFFICE**

DATE: August 13, 2004

TO: Board of Selectmen

FROM: Don P. Johnson

SUBJECT: Conservation Restriction and Public Access Easement, Powdermill Road

Town Counsel has been negotiating the agreement that is memorialized in the attached document with Mr. Bertolomi and his attorney for two years or more. Andy Magee and Tom Tidman have been the primary representatives of the Town in this matter. Where needed, I have been involved. All parties have now agreed on the terms and conditions.

This is an agreement that needs the signatures of both the Selectmen and the Conservation Commission. The Conservation Commission signed on July 21 and the documents have now come to the Board for signature. Town Counsel assures me that it is appropriate for the Board to sign at this time.

CONSERVATION RESTRICTION and PUBLIC ACCESS EASEMENT

I. Granting Clause

LEO F. BERTOLAMI, as he is TRUSTEE of OLD MILL DEVELOPMENT TRUST u/d/t dated January, 1986, recorded with Middlesex (S.D.) Registry of Deeds in Book 16728, Page 578, and AUTOPLEX REALTY LLC, a limited liability company organized according to the laws of the Commonwealth of Massachusetts with the usual place of business at 6 Proctor Street, Acton, Massachusetts, (hereinafter, together, the "Grantor"), acting pursuant to Sections 31, 32 and 33 of Chapter 184 of the General Laws, for the consideration of One Dollar (\$1.00) paid, grant to the CONSERVATION COMMISSION of the TOWN OF ACTON, a duly constituted governmental body under General laws Chapter 40, Section 8C, with a place of business at Town Hall, 472 Main Street, Acton, Massachusetts, and its successors and permitted assigns (hereinafter the "Grantee"), in perpetuity and exclusively for conservation purposes, a Conservation Restriction pursuant to Mass. Gen. Laws Chapter 184, Sections 31-33 on:

(a) those two certain parcels of unimproved land in Acton, Middlesex County, Massachusetts shown as "Canoe Landing Lease Area 42,420 Sq. Ft. (0.97 acres)"¹ and as "Conservation Restriction Area 156,190 Sq. Ft. (3.59 acres)" (but in all events excluding the parcel shown as "Unrestricted Area 27.175 Sq. Ft. (0.62 Acres)", all as shown on a plan entitled "Sketch Plan of Land 67 Powder Mill Road, Acton, MA" Prepared for Leo Bertolami scale 1" = 40' "dated May 16, 2003, and drawn by Acton Survey & Engineering, Inc., a copy of which is recorded herewith ("the Sketch Plan"); and

(b) the portions of Lot A and Lot 1, as shown on a plan entitled "Easement Plan 50-56 & 60 Powder Mill Road, Acton, Massachusetts" dated June 2003 prepared by Acton Surveying & Engineering, Inc., a copy of which is recorded herewith ("the Easement Plan") lying between the landward line of a 10 foot wide construction easement which is located partly on said Lot A and partly on said Lot 1, and the Assabet River.

The land subject to the Conservation Restriction and Public Access Easement hereinafter set forth (hereinafter "Conservation Restriction") is referred to in this Conservation Restriction as the "Premises".

II. Purposes

The Premises described in the Granting Clause above contains unusual, unique or outstanding qualities, the protection of which in their predominately natural or open condition will be of benefit to the public.

¹ Notwithstanding the use of the term "Lease" on the plan, no leasehold interest is created under this Conservation Restriction; the "Lease" area is the portion of the restricted parcel designated herein for public use as a Canoe Landing area.

The Premises include over one thousand linear feet of frontage on the bank of the Assabet River which flows 31 miles from its source in Westborough, Massachusetts to its confluence with the Sudbury River in Concord, Massachusetts, and has been designated by the Department of Environmental Protection as one of the Commonwealth's "major rivers" for purposes of the administration of the Rivers Protection Act (310 CMR 10.58(2)(a)1.e.).

Because of its proximity to the Assabet River, the Premises is significant to those interests identified in the Wetlands Protection Act, including water supply, flood control, the prevention of pollution, and the protection of wildlife habitat.

The Assabet River is an important recreational resource for various recreational activities including canoeing, kayaking and fishing. The premises also abuts Powdermill Road and provides an opportunity for access to the Assabet River by the public for those purposes.

Whereas the preservation of these areas in their present condition is significant to the natural, scenic, and historically rural character of the Town of Acton and the Assabet River watershed;

Whereas the preservation and protection of the Riverfront Area and other wetland resource areas on the Premises will be furthered by restricting the use of the premises in accordance with this Conservation Restriction;

Whereas the preservation and protection of wildlife habitat in and around the Premises will be furthered by restricting the use of the Premises in accordance with this Conservation Restriction;

Whereas, the Grantor has agreed to tender this Conservation Restriction in connection with the issuance of a Superseding Order of Conditions permitting the development of Lot A and Lot 1 on the Easement Plan (DEP Wetlands File No. 85-707) and in connection with the settlement of certain enforcement claims pertaining to the Canoe Landing Lease Area as shown on the Sketch Plan;

Therefore, the Grantor agrees to grant this Conservation Restriction to the Grantee to promote these purposes.

III. Prohibited Acts and Uses, Exceptions Thereto, and Permitted Uses

A. Prohibited Acts and Uses

Subject to the exceptions set forth in Paragraph B below, the following acts and uses are prohibited on the Premises:

1. Constructing or placing of any road, driveway, building, tennis court, landing strip, mobile home, swimming pool, fences, asphalt or concrete pavement, sign, billboard or other advertising display, antenna, utility pole, tower, conduit, line or

other temporary or permanent structure or facility on, below or above the Premises;

2. Mining, excavating, dredging or removing from the Premises of soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit;
3. Placing, filling, storing or dumping on the Premises of soil, refuse, trash, vehicle bodies or parts, rubbish, junk, waste or other substance or material whatsoever or the installation of underground storage tanks;
4. Cutting, removing or otherwise destroying trees, grasses or other vegetation;
5. Activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation;
6. Any other use of the Premises or activity that would materially impair significant conservation interests that are the subject of this Conservation Restriction.

B. Exceptions to Otherwise Prohibited Acts and Uses: Grantor's Rights

Notwithstanding the foregoing limitations, the Grantor reserves all rights incident to the fee simple ownership of the premises, including complete rights of access, the right to limit access to the Premises to its own licensees and invitees except as set forth in the Public Access Easement in Section IV. below, and to conduct the following acts and uses otherwise prohibited in subparagraph A, but only if such acts or uses do not materially impair significant conservation interests, and only in accordance with such permits as may be required under the Wetlands Protection Act or other similar federal, state or local requirements now in effect or adopted subsequent to this Conservation Restriction.

1. Selective cutting of trees and brush for fire protection, storm damage clean-up, or otherwise to preserve the present conditions of the Premises.
2. Forest management practices (including but not limited to the selective cutting and planting of trees) carried out in accordance with a professional forest cutting plan approved by the Grantee.
3. Division of any of the lots restricted herein into two or more parcels of land and the conveyance of the restricted premises in whole or in part, provided that there shall be a reference to this Conservation Restriction in any instrument of conveyance.
4. The right of the Grantor to abate any condition which is dangerous or inconsistent with the purposes of this Conservation Restriction.

5. The control of noxious, nuisance or non-native plant or animal species by any mechanical or chemical method, provided that such methods are in accordance with a plan approved by the Grantee.

C. Exceptions to Otherwise Prohibited Acts and Uses: Grantee's Rights

The following acts and uses otherwise prohibited in subparagraph A are permitted by the Grantee and/or the public, as specified in Section IV. below, but only if such acts or uses do not materially impair significant conservation interests, and only in accordance with such permits as may be required under the Wetlands Protection Act or other similar federal, state or local requirements now in effect or adopted subsequent to this Restriction.

1. Construction, use, maintenance and reconstruction of a kayak/canoe launching platform, a storage shed for items related thereto, and the construction and maintenance of a public parking area with appurtenances thereto, provided, however, that all such activities are restricted to the portion of the Premises identified as "Canoe Landing Lease Area" on the Plan.
2. The construction and maintenance of an unpaved walking trail generally parallel to the Assabet River within that portion of the Premises described in "a)" and "b)" in the above granting clause.
3. Use of the premises for outdoor recreation purposes, including walking, boating, parking and signage.
4. Selective cutting of trees and brush for fire protection, storm damage clean-up, unpaved trail construction and maintenance, tick control, or otherwise to preserve the present conditions of the Premises.

D. Permitted Acts and Uses

All acts and uses not prohibited by subparagraphs A, B and C are permissible.

IV. Public Access Easement

There is hereby granted to the Grantee the right to construct the facilities and to carry out the activities described in Section III. C., above, for the convenience of and use by the public for outdoor recreational purposes, provided that it shall maintain the Premises in a good and serviceable condition at its sole expense, and provided further that no fee or charge shall be imposed for the use of the Premises by the public so as to secure the benefit of the limitations on liability provided by Massachusetts General Laws Chapter 21, § 17C for so long as it or any successor statute may remain in effect.

There is hereby granted to the public the use of the Premises for the purposes described in Section III. B. 3., above, subject to the terms of this Conservation Restriction and to such additional rules, regulations and limitations as may be imposed by the Grantee as necessary to maintain the public access areas in good and serviceable condition.

Except as specified in this Section IV., the Conservation Restriction hereby conveyed does not grant to the Grantee, to the general public, or to any other person any right to enter upon the Premises except there is granted to the Grantee and its representatives the right to enter the Premises at reasonable times and in a reasonable manner for the purpose of inspecting the same to determine compliance herewith.

V. Legal Remedies of the Grantee:

A. Legal and Injunctive Relief

The rights hereby granted and retained shall include the right to enforce this Conservation Restriction by appropriate legal proceedings and to obtain injunctive and other equitable relief against any violations, including, without limitation, relief requiring restoration of the Premises to its condition prior to the time of the injury complained of (it being agreed that the Grantee may have no adequate remedy at law), and shall be in addition to, and not in limitation of, any other rights and remedies available to the Grantee.

B. Severability Clause

If any provision of this Conservation Restriction shall to any extent be held invalid, the remainder shall not be affected thereby.

C. Non-Waiver

Any election by the Grantee as to the manner and timing of its right to enforce this Conservation Restriction or otherwise to exercise its rights hereunder shall not be deemed or construed to be a waiver of any other rights.

VI. Assignability

A. Running of the Burden

The burden of this Conservation Restriction shall run with the Premises in perpetuity, and shall be enforceable against the Grantor, its successors and assigns and any others holding any interest in the Premises.

B. Execution of Instruments

The Grantee is authorized to record or file any notices or instruments appropriate to assuring notice of, and the perpetual enforceability of this Conservation Restriction.

C. Running of the Benefit

The benefits of this Conservation Restriction shall be in gross and shall not be assignable by the Grantee, except in the following instances and from time to time.

1. As a condition of any assignment, the Grantee requires that the purpose of this Conservation Restriction continue to be carried out.
2. The assignee, at the time of assignment, qualifies under Section 32 of Chapter 184 of the Massachusetts General Laws as an eligible donee to receive this Conservation Restriction directly.
3. The Grantee has complied with the provisions of Article XCVII of the Constitution of the Commonwealth of Massachusetts.

VII. Subsequent Transfers:

The Grantor agrees to incorporate by reference the terms of this Conservation Restriction in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Premises.

VIII. Estoppel Certificates:

Upon request by the Grantor, the Grantee shall within thirty (30) days execute and deliver to the Grantor any reasonable document, including an estoppel certificate, which certifies the Grantor's compliance with any obligation of the Grantor contained in this Conservation Restriction.

IX. Maintenance

The Grantee at its sole expense shall maintain the portion of the Premises to which public access is permitted under Section IV., above, in a good, safe and serviceable condition.

The Grantor reserves the right to enforce the Grantee's obligations to maintain the public access areas of the Premises by appropriate legal proceedings and to obtain injunctive and other equitable relief relative thereto. Any election by the Grantor as to the manner and timing of its right to enforce the Grantee's obligations under this Conservation Restriction or otherwise to exercise its rights hereunder shall not be deemed or construed to be a waiver of any other rights.

X. Extinguishment

A. Grantee's Receipt of Property Right

The Grantor and the Grantee agree that the conveyance of this Conservation Restriction gives rise for purposes of this paragraph to a real property right, immediately vested in the Grantee, with a fair market value that is at least equal to the proportionate value that this Conservation Restriction determined at the time of the gift bears to the value of the unrestricted Premises at that time.

B. Proportionate Value of Grantee's Interest

Such proportionate value of the Grantee's property right shall remain constant.

C. Right of Grantee to Recover Proportional Value at Disposition

If any occurrence ever gives rise to extinguishment or other release of the Conservation Restriction under applicable law, then the Grantee, on a subsequent sale, exchange or involuntary conversion of the Premises, shall be entitled to a portion of the proceeds equal to such proportionate value, subject, however, to any applicable law which expressly provides for a different disposition of proceeds.

D. Grantor/Grantee Cooperation Regarding Public Action

Whenever all or part of the Premises or any interest therein is taken by public authority under power of eminent domain or other act of public authority, then the Grantor and the Grantee shall cooperate in recovering the full value of all direct and consequential damages resulting from such action.

E. Allocation of Expenses upon Disposition

All related expenses incurred by the Grantor and the Grantee shall first be paid out of any recovered proceeds, and the remaining proceeds shall be distributed between the Grantor and Grantee in shares equal to such proportionate value.

F. Continuing Trust of Grantee's Share of Proceeds of the Conservation Restriction Disposition

The Grantee shall use its share of the proceeds in a manner consistent with the conservation purposes of this grant in accordance with G.L. c. 44, § 63.

XI. Effective Date

This Conservation Restriction shall be effective when the grantor and the Grantee have executed it, the administration approvals required by Section 32 of Chapter 184 of

the Massachusetts General Laws have been obtained, and it has been recorded at the Middlesex County (South District) Registry of Deeds.

XII. Recordation:

The Grantee shall record this instrument and the plans referred to therein in timely fashion in the Middlesex (South District) Registry of Deeds.

XIII. Subordination

The present holder of mortgages on Lot A as shown on the Easement Plan and owned by Autoplex Realty LLC is Citizens Bank of Massachusetts, as successor to Community National Bank of Hudson, Massachusetts. These mortgages are recorded at the Middlesex South District Registry of Deeds at Book 41471, Page 149 and Book 41471, Page 157. The present holder of a mortgage on the land shown on the Sketch Plan and owned by Old Mill Development Trust is Middlesex Savings Bank of Natick, Massachusetts. That mortgage is recorded at the Middlesex South District Registry of Deeds at Book 20202, Page 201. The mortgagees agree to hold the aforesaid mortgages subject to the foregoing Conservation Restriction and agree that the covenants herein shall have the same force and effect as though executed and recorded before the grant of the aforesaid mortgages and further agree that the mortgages shall be subordinate to this Conservation Restriction.

XIV. Title Reference

For title of Autoplex Realty LLC to Lot A and Lot 1 as shown on the Easement Plan, see deed of Leo Bertolami, Trustee of the Wayside Development Trust dated August 20, 2003 and recorded at the Middlesex County South District Registry of Deeds at Book 41471, Page 146 and the deed of Edward J. Troisi dated March 18, 2000 and recorded at the Middlesex County South District Registry of Deeds at Book 31260, Page 415. For title of Leo F. Bertolami, as Trustee of Old Mill Development Trust, to the parcels shown on the Sketch Plan, see deed of Dean E. Comeau, Executor of the Estate of Charles E. Comeau, dated January 23, 1986 and recorded at the Middlesex County South District Registry of Deeds at Book 16728, Page 584.

Executed under seal this _____ day of _____, 2004.

AUTOPLEX REALTY LLC

Leo F. Bertolami, as he is
Trustee of Old Mill Development
Trust as aforesaid, but not Individually

BY: _____
Leo F. Bertolami, Manager

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. _____, 2004

Then personally appeared before me, the undersigned notary public, the above-named Leo F. Bertolami, trustee of Old Mill Development Trust as aforesaid, proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that he signed it voluntarily for its stated purpose, both individually and as such trustee.

, Notary Public

My commission expires

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss _____, 2004

Then personally appeared before me, the undersigned notary public, the above-named Leo F. Bertolami, as Manager of Autoplex Realty LLC, and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that he signed it voluntarily for its stated purpose on behalf of Autoplex Realty LLC

, Notary Public

My commission expires

SUBORDINATION BY MORTGAGEES

CITIZENS BANK OF MASSACHUSETTS

BY: _____

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss _____, 2004

Then personally appeared before me, the undersigned notary public, the above named _____ and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that s/he signed it voluntarily for its stated purpose on behalf of Citizens Bank of Massachusetts.

, Notary Public

My commission expires

MIDDLESEX SAVINGS BANK

BY: _____ [Title]

THE COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss _____, 200__

Then personally appeared before me, the undersigned notary public, the above named _____ and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that s/he signed it voluntarily for its stated purpose on behalf of Middlesex Savings Bank.

, Notary Public

My commission expires

ACCEPTANCE BY THE ACTON CONSERVATION COMMISSION

The Town of Acton Conservation Commission hereby accepts this Conservation Restriction and Public Access Easement in accordance with the provisions of Massachusetts General Law, Chapter 40, Section 8C and G.L. c. 184, § 32.

Terence Mantland

[Signature]

Jeff Rogers

Susan D. Plover

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

July 21st, 2004

Then personally appeared before me, the undersigned notary public, the above named Andrew Magee and proved to me through satisfactory evidence of identification, which were known to me, to be the person whose name is signed on the preceding document, and acknowledged that s/he signed it voluntarily for its stated purpose on behalf of the Acton Conservation Commission.

Andrea H. Ristine
Andrea H. Ristine Notary Public

My commission expires 2/27/09

ANDREA H. RISTINE
Notary Public
Commonwealth of Massachusetts
My Commission Expires
February 27, 2009

APPROVAL OF SELECTMEN

We, the undersigned members of the Board of Selectmen of the Town of Acton hereby certify that we approved the receipt of the foregoing Conservation Restriction under M.G.L. c. 40, Section 8C and M.G.L. C. 184, Section 32 as they have been and may be amended, for the protection of the natural and watershed resources of the town.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss

, 200____

Then personally appeared before me, the undersigned notary public, the above named _____ and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that s/he signed it voluntarily for its stated purpose on behalf of the Board of Selectmen of the Town of Acton.

, Notary Public

My commission expires _____

**APPROVAL BY SECRETARY OF ENVIRONMENTAL AFFAIRS
COMMONWEALTH OF MASSACHUSETTS**

The undersigned Secretary of The Executive Office of Environmental Affairs of the Commonwealth of Massachusetts hereby certifies that the foregoing Conservation Restriction has been approved as being in the public interest pursuant to Massachusetts General Laws Chapter 184, Section 32.

Approval of this Conservation Restriction pursuant to Massachusetts General Laws Chapter 184, Section 32 by any municipal officials and by the Secretary of Environmental Affairs is not to be construed as representing the existence or non-existence of any pre-existing rights of the public, if any, in and to the Premises, and any such pre-existing rights of the public, if any, are not affected by the granting of this Conservation Restriction.

Dated: _____

Ellen Roy Herzfelder
Secretary, Executive Office of Environmental
Affairs

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

, 200__

Then personally appeared before me, the undersigned notary public, the above named Ellen Roy Herzfelder and proved to me through satisfactory evidence of identification, which were _____, to be the person whose name is signed on the preceding document, and acknowledged that she signed it voluntarily for its stated purpose as Secretary of the Executive Office of Environmental Affairs of the Commonwealth of Massachusetts.

, Notary Public

My commission expires _____